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## COMMONWEALTH OF MASSACHUSETTS

## SUPREME JUDICIAL COURT

## FOR THE COMMONWEALTH

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OE-062

IN THE MATTER OF PAUL P. HEFFERNAN

DECISION AND ORDER

We have before us the Report and Recommendation (Report) of the Commission on Judicial Conduct (commission) on two complaints against Paul P. Heffernan, a Justice of the District Court Department. The commission filed its Report after it had received a February 11, 1988, report from Thomas R. Kiley whom this court appointed in the summer of 1987 to act as a hearing officer on both complaints. Mr. Kiley heard evidence on eighteen days and received numerous exhibits, including tape recordings of certain court proceedings.

The Complaints and Recommendations

The first complaint charged Judge Heffernan with the violation of Canon 2 (A) and Canon 3 (A) (3) of the Code of Judicial Conduct (see S.J.C. Rule 3:09, as appearing in 382 Mass. 809 [1981]) in his handling of Pamela Dunn v. Paul Dunn, a domestic abuse case brought under G. L. c. 209A in the Somerville Division of the District Court Department. For reasons we discuss more fully later, the hearing officer recommended that Judge Heffernan be publicly reprimanded or censured for violation of Canon 3 (A) (3). The hearing officer concluded that publicity surrounding these complaints made



public discipline unavoidable in this matter. The commission has also recommended that this court impose a public censure based, however, on its conclusion that the circumstances require a public censure quite apart from the public attention this matter has received. The commission concluded that Judge Heffernan had violated Canon 2 (A) as well as Canon 3 (A) (3).

The second complaint alleged a pattern of misconduct in the handling of several cases involving alleged rudeness and discourtesy to persons coming before the judge, insensitivity to the safety of chapter 209A complainants, and reluctance to implement G. L. c. 209A. The commission agreed with the hearing officer's recommendation that the so-called pattern complaint be dismissed. We accept that conclusion and will direct our attention to the judge's conduct in the handling of the Dunn case.

Although the hearing officer concluded that the bulk of the charges against the judge were unfounded, he determined that, during the hearings in the Dunn matter, Judge Heffernan "was not patient, dignified and courteous with respect to Pamela Dunn or the victim/witness advocate who accompanied her." He ruled that Judge Heffernan violated Canon 3 (A) (3) which provides that "[a] judge should be patient, dignified, and courteous to litigants . . . and others with whom he deals in his official capacity." The commission agreed and spelled out the basis for its conclusion at pages 11-19 of its Report. We need not repeat those detailed circumstances here. We agree with the commission's reasoning on this point.

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It is sufficient to state that Pamela Dunn was seeking court protection from her husband who had beaten and choked her and had locked her out of their apartment. The commission concluded that "Judge Heffernan did not accord Pamela Dunn the patience, dignity, courtesy, and sensitivity which she was due under both the Canons and the Standards [of Judicial Practice for Abuse Prevention Proceedings, issued by the District Court Department]." She was subjected, the commission said, "to rudeness, discourtesy, sarcasm, and hostility from Judge Heffernan." We agree.

We pause to make two points. First, Judge Heffernan did not deny Pamela Dunn the protective order she sought. Such an order was granted and was in full effect in August, 1986, when Paul Dunn murdered his wife, following their reconciliation and a second separation. The conclusion is unavoidable from the record that Judge Heffernan forcefully warned Paul Dunn not to violate the protective order he had issued. The area of difficulty in the Dunn proceeding concerned Pamela Dunn's desire to obtain her clothes from the apartment. Second, we do not accept the commission's implicit determination that discipline may be imposed for violation of the District Court Department's Standards of Judicial Practice. If judicial discipline is to be imposed, it must be because of a violation of the Code of Judicial Conduct. Standards of Judicial Practice, which are prepared and distributed by the District Court Department, are worthwhile guides for judges in the handling of various matters, but they do not prescribe standards of judicial conduct.





The commission disagreed with the hearing officer's conclusion that Judge Heffernan had not violated Canon 2 (A). In relevant part, that canon states that "[a] judge . . . should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The hearing officer concluded that Judge Heffernan's comments eroded public confidence in the judiciary but that they did "not reflect on the integrity or impartiality of the judiciary."

#### Discussion

The general precatory words of Canon 2 (A) have not been the subject of substantial judicial analysis. In a sense, one might be inclined to view Canon 2 (A) as reaching beyond rudeness and sarcasm to serious misconduct involving an erosion of public confidence in the integrity or impartiality of the judiciary. On the other hand, the thrust of Canon 2 (A) is hortatory, calling for positive conduct (promoting public confidence), and it does not directly state what a judge should not do. The Supreme Judicial Court of Maine has concluded, without discussion, that, where there was discourteous conduct in violation of Canon 3 (A) (3) (as here) and Canon 3 (A) (4), that conduct was also a violation of Canon 2 (A). Matter of Kellam, 503 A.2d 1308, 1310 (Me. 1986).

We do not find it necessary to determine whether Judge Heffernan violated Canon 2 (A) as well as Canon 3 (A) (3). It makes no difference in the level of discipline we impose. It is clear beyond serious dispute that Judge Heffernan violated Canon 3





(A) (3). He was rude and sarcastic during portions of the Dunn proceeding. A single listening to the tape recording of those hearings establishes those facts. What is important in relation to the charge of a violation of Canon 2 (A) is the fact that Judge Heffernan was not only discourteous and sarcastic but his conduct created the impression that the dispute over clothing was not welcome in his courtroom. The hearing officer found that, after the last hearing, Pamela Dunn justifiably believed that Judge Heffernan's courtroom was not open to her with respect to further efforts to secure her clothing. Judge Heffernan's comments were thus not only rude and sarcastic but, beyond hurt feelings and embarrassment, they gave the impression that the court was unavailable to deal with the question of Pamela Dunn's clothing, a purpose for which it should have been available. ✓<sup>1</sup> Although we agree that forceful words from a judge seeking to influence parties to implement his orders are often appropriate, it was wrong in this process to create the reasonably held impression that the court was unavailable for a legitimate purpose.

Before we discuss the level of discipline appropriately to be imposed in this matter, we must present two circumstances that arose following the judge's misconduct. First, we discuss the publicity that came to be focused on Judge Heffernan and his handling of the Dunn case. Next, we relate the determination of

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✓<sup>1</sup>The hearing officer did find, however, that Pamela Dunn could not have reasonably believed that the court was unavailable to provide her protection or to enforce its restraining orders.



Chief Justice Zoll of the District Court Department to investigate Judge Heffernan's handling of G. L. c. 209A cases and his instructions to Judge Heffernan following that investigation.

In August, 1986, approximately five months after the Dunn domestic abuse case was before Judge Heffernan, Paul Dunn murdered Pamela Dunn. In the month after the hearings before Judge Heffernan, Pamela Dunn had moved back into the apartment with Paul Dunn. She left him again on June 17, 1986. On August 16, Paul Dunn killed Pamela Dunn. He has been convicted of murder in the first degree.

The parties have agreed that "[t]here is no connection between the murder of Pamela Dunn in August 1986 and the hearings before Judge Heffernan in the Somerville District Court in March 1986." There were newspaper articles that drew such a connection. Those articles did not mention that the parties had reconciled their differences and lived together for two months between the March court proceedings and the August murder. The articles also recounted the views of various people that Judge Heffernan and also the presiding justice of the Somerville District Court routinely harassed women who sought protective orders against husbands and boy friends.

Pamela Dunn's parents wrote a letter of complaint against Judge Heffernan to Chief Justice Zoll of the District Court Department. With the assistance of Appeals Court Justice Edith W. Fine and Dr. Mary Jane England, former Commissioner of the Department of Social Services, Chief Justice Zoll reviewed tapes

The first part of the paper discusses the importance of the research and the objectives of the study. It highlights the need for a comprehensive understanding of the subject matter and the role of the researcher in this process. The second part of the paper presents the methodology used in the study, including the data collection methods and the analysis techniques. The third part of the paper discusses the results of the study and the conclusions drawn from the findings. The final part of the paper provides a summary of the key points and offers suggestions for future research.

of numerous chapter 209A proceedings presided over by Judge Heffernan. In March, 1987, the Chief Justice wrote Judge Heffernan a letter which the Chief Justice made public. Chief Justice Zoll noted positive and negative aspects of Judge Heffernan's handling of chapter 209A cases. He suggested various ways in which the judge could improve his performance. He indicated that, when Judge Heffernan (who had withdrawn from hearing chapter 209A cases following the adverse publicity) should resume hearing chapter 209A cases, he would be subject to peer review by another District Court judge. Judge Heffernan has not resumed hearing chapter 209A cases.

It seems reasonably clear that part of Judge Heffernan's problem comes from his loud, deep voice, physically imposing manner, and his apparent unawareness of the intimidating effect he might have on people who appear before him. We also conclude, however, from our review of Judge Heffernan's testimony in this proceeding that his level of sensitivity may need to be raised. The judge was unwilling in his testimony to recognize the obvious fact that many of his remarks in the Dunn case were sarcastic, rude, and undignified. He was also unwilling or unable to appreciate the negative effect of many of his remarks on Pamela Dunn and her witness/victim advocates. The judge's testimony that, in context, substantially all his remarks were proper is troubling for the future. Perhaps events in this proceeding since he testified have increased Judge Heffernan's consciousness. Even before us, however, possibly only for



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tactical reasons, he has argued that his conduct was not rude and discourteous and his words not sarcastic. It is important that Judge Heffernan (as well as every other judge) be alert to how his words and manner may be perceived by others, many of whom may be intimidated generally by court proceedings and judges and specifically by a particular judge's manner.

It is this court's hope that, in the near future, procedures can be established that would bring such matters to the attention of judges outside the judicial discipline process. We anticipate receiving a report from our Committee on Judicial Performance Evaluation in the next few months and hope that it will propose the creation of some process or processes by which a judge's performance can be evaluated in a constructive and confidential way. We envision that the investigation and recommendations of Chief Justice Zoll in response to complaints against Judge Heffernan would represent an appropriate way to seek to correct perceived deficiencies in a judge's performance, except that the investigation and the recommendations would in all respects normally remain confidential. In this instance, because of the publicity surrounding the Dunn matter and the handling of chapter 209A cases in the Somerville District Court, Chief Justice Zoll did make his letter to Judge Heffernan public.

#### Discipline to be Imposed

We believe that a private reprimand is the appropriate discipline to impose for Judge Heffernan's violations of the Code of Judicial Conduct. Many of the charges alleged in the complaint



were simply not proved. This is the first formal judicial proceeding involving this judge. He has an excellent reputation among many lawyers and judges. Several highly regarded trial judges testified on his behalf. He has a wealth of experience and knowledge in the handling of juvenile cases in the courts. In the normal course, a private reprimand with required consulting, training, and monitoring would be an appropriate response.

If there had been no murder and only a complaint had been filed about Judge Heffernan's handling of the Dunn matter, a private reprimand would have served the purpose of seeking to eliminate undesirable, inappropriate behavior without public embarrassment to the judge. There is no indication that Judge Heffernan intended to embarrass and intimidate Pamela Dunn. His errors were rudeness and sarcasm and a failure to perceive the effect of what he was doing on Pamela Dunn and her advocates. The first time such misconduct occurs, public censure is not the disposition of choice in a case of this kind. The facts of this case do not fit the pattern of cases in which this court has imposed public censure on a judge. See Matter of Donohue, 390 Mass. 514 (1983); Matter of Killam, 388 Mass. 619 (1983); Matter of McKenney, 384 Mass. 76 (1981); Matter of Scott, 377 Mass. 364 (1979); Matter of Larkin, 368 Mass. 87 (1975); Matter of Morrissey, 366 Mass. 11 (1974). We believe the commission simply placed this case in the wrong category for disciplinary purposes.

The hearing officer stated his "belief that the image of the judiciary as a whole and Judge Heffernan in particular had been



tarnished by an inaccurate portrayal of the actual events in the Dunn case and that public confidence cannot be restored unless the disposition of the proceedings is [made] public." He suggested that he might well have recommended a private reprimand but for the inaccurate public accounts of the Dunn case. Judge Heffernan himself recommended to the commission that, if it would recommend a private reprimand instead of a public censure, he would agree that the fact of the private reprimand be made public.

### Conclusion

We have noted that inaccurate reports concerning the Dunn proceeding in relation to Pamela Dunn's unfortunate death have complicated this disciplinary proceeding. We have further noted that we will not permit public concern based on those inaccuracies to influence our determination of the proper level of discipline to be imposed in this matter. We believe that, as we have said, the appropriate level of discipline is a private censure and that this decision and order, the commission's report, and the hearing officer's report (but not the transcript of the hearing before him) should be made public. ✓<sup>2</sup>

Although one would expect a private censure to remain private, in the special circumstances of this case we cannot simply impose a private censure and announce that the matter

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✓ Chief Justice Zoll's letter of March 10, 1987, which was an exhibit in this proceeding, has already been made public. A transcript of the hearings before Judge Heffernan in the Dunn case was an exhibit and is made available with this decision and order, as is the "Agreed Statement of Facts" which the commission's counsel and Judge Heffernan filed with the hearing officer.



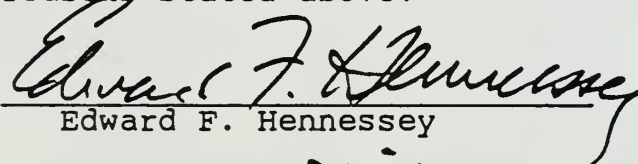


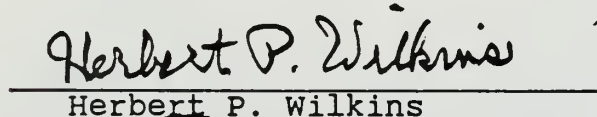


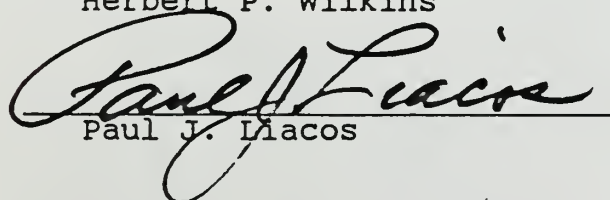
closed. We publish this opinion primarily because the matter is already in the public domain. Chief Justice Zoll, the hearing officer, and to a degree Judge Heffernan himself have recognized the need for a public explanation of what is decided in this matter. We reject, however, the solution that public censure should be imposed as a means of assuring that the public will know what we have done. We should not modify the appropriate level of discipline in order to assure publicity. In light of changes made in G. L. c. 211C, as appearing in St. 1987, c. 656, and applicable to proceedings initiated on and after April 1, 1988, a hearing such as was held here would in similar circumstances normally be public, as would the hearing officer's findings, the commission's report to this court, and this court's decision. See G. L. c. 211C, §§ 5 and 6.

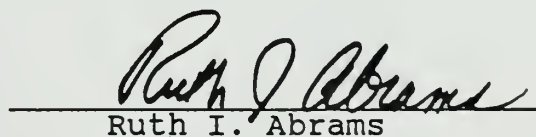
We fully concur in the requirements that Chief Justice Zoll imposed on Judge Heffernan. It will be up to Chief Justice Zoll to determine when Judge Heffernan should resume sitting on G. L. c. 209A cases.

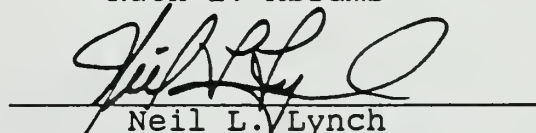
Judge Paul P. Heffernan is privately reprimanded for the reasons stated above.

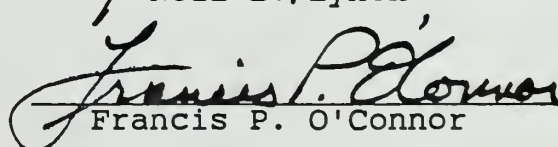
  
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Entered: September 28, 1988

